

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION**

**KENNETH S. McARDLE**

**V.**

**MATTEL INC.**

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**1:06-CV-103**

**ORDER OVERRULING OBJECTIONS AND ADOPTING  
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS**

The court referred this matter to the Honorable Earl S. Hines, United States magistrate judge, at Beaumont, Texas, for consideration pursuant to applicable laws, orders of this court and, particularly, General Order 05-07.

After considering defendant Mattel Inc.'s motion to dismiss, the magistrate judge recommends granting the motion in part and denying it in part. Plaintiff does not object. However, defendant objects to the magistrate judge's analysis and recommendations that the motion be partially denied with respect to plaintiff's claims for (1) negligent misrepresentation; (2) breach of implied contract; and (3) trade dress infringement. Further, defendant objects to the magistrate judge's recommendation that plaintiff's fraud claim be dismissed based on failure to comply with Rule 9, Federal Rule of Civil Procedure, instead of Copyright Act preemption.

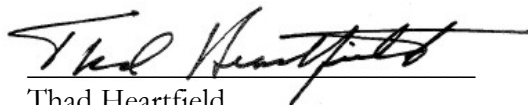
Having considered the magistrate judge's report and conducted a *de novo* review of defendant's objections, the court concludes that the findings of fact and conclusions of law of the magistrate judge are correct, and defendant's objections are not meritorious. The asserted causes of

action for breach of implied contract and negligent misrepresentation have qualitatively different elements and rest on sufficiently alleged distinct facts, viz., promises, statements and representations to pay plaintiff for his work, so that these claims are not preempted. Similarly, plaintiff's trade dress infringement claim is not premised on expression of his work, but on the source and meaning his product has acquired in the market, and is not preempted. Finally, the court finds no reason to engage in purely academic exercise of examining defendant's objection regarding plaintiff's common law fraud claim. The magistrate judge's report recommends that the claim be dismissed under Rule 9, and plaintiff does not object. Although defendant apparently prefers dismissal on another ground asserted in its motion, there is no prejudice to defendant because defendant will receive complete relief under the magistrate judge's analysis and recommendation.

Accordingly, defendant's objections are **OVERRULED**, and the report of the magistrate judge is **ADOPTED**.

By separate order, the court will implement the recommendations submitted by the magistrate judge.

**SIGNED** this the **13** day of **September, 2006**.

A handwritten signature in black ink, appearing to read "Thad Heartfield", written over a horizontal line.

Thad Heartfield  
United States District Judge